SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

JAMES SHULTZ, RENEE CHEATHAM, TERIA YOUNG, and STEVEN ALLORE,

Petitioners,

-against-

NEW YORK STATE EDUCATION DEPARTMENT, SHANNON TAHOE, in her official capacity as Interim Commissioner of Education of the New York State Education Department, and TEMITOPE AKINYEMI, in her official capacity as Chief Privacy Officer of the New York State Education Department,

Respondents,

LOCKPORT CITY SCHOOL DISTRICT,

Intervenor-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Index No. 904134-20
Hon. James H. Ferreira

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' AND INTERVENOR-RESPONDENT'S MOTIONS TO DISMISS AND IN FURTHER SUPPORT OF AMENDED VERIFIED PETITION

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PRELIMINARY STATEMENT

In this Article 78 Petition, parents of children attending the Lockport City School District ("Lockport" or the "District") seek the annulment and revocation of the New York State Education Department's ("NYSED") determination that Lockport's face recognition technology system, which uses high resolution cameras to scan the faces of school children to generate biometric data that is compared to biometric data of individuals prohibited from school grounds, does not implicate "student data" and therefore is not covered by Education Law §2-d. NYSED's November 27, 2019 letter setting forth this interpretation and giving Lockport permission to activate the system (the "Determination") has not been rescinded or revoked, resulting in continued harm to the Petitioners.

NYSED and Lockport now move to dismiss, arguing that the matter is moot, that there is no private right of action under Education Law §2-d, and that the Determination is not final. Defendants' arguments must fail because NYSED and Lockport fundamentally misunderstand the nature of this Article 78 proceeding, mischaracterizing this action challenging a final agency determination as an action to enforce Education Law §2-d. In fact, under NYSED's Determination, Education Law §2-d does not even apply to the data produced from Lockport's system.[1] If the data from the system is not "student data" then Education Law §2-d does not apply, and the resultant protections of the law do not accrue to the Petitioners and their children. This is the exact harm the Petition aims to remedy, and which is on-going. Accordingly, Respondents' motions to dismiss the Petition should be denied and the Petition should be granted.

[1] Factual recitations within this memorandum cite to the Amended Verified Petition dated July 23, 2020 ("AP") the supporting affidavits and affirmation and the exhibits thereto and to the exhibits to the Supplemental Supporting Affirmation of Stefanie D. Coyle, dated March 25, 2021 ("Coyle Ex"). Citations to NYSED's and Lockport's memoranda of law appear as "NYSED Br" and "Lockport Br."

ADDITIONAL FACTUAL BACKGROUND

New York State Technology Law §106-b

Since the filing of the Petition, the New York State Legislature passed and Governor Cuomo signed A6787/S5140, enacting section §106-b of the New York State Technology Law.[2] Technology Law §106-b(2)(a) enacts a moratorium, prohibiting all public and nonpublic elementary and secondary schools "from purchasing or utilizing biometric identifying technology for any purpose, including school security" (Technology Law §106-b). Biometric identifying technology is "any tool" that uses "an automated or semi-automated process that assists in verifying a person's identity based on a person's biometric information" (*Id.* at §106-b(1)(a)). The moratorium is in effect until July 2022 or until the Commissioner of Education authorizes use of biometric identifying technology following the issuance of a report on the technology in schools, whichever comes later (*Id.* at §§106-b(2)(a), (3)(a)). The report, to be issued by the Director of the Office of Information Technology Services, must consider whether biometric identifying technology should be used in schools, the privacy implications of such systems, accuracy rates for different demographic groups, data security and access, costs, the impact on student civil rights and liberties, and the interplay of biometric identifying technology with Education Law §2-d (*Id.* at §106-b(3)(a)(i)–(xii)). Section 106-b does not address whether schools are required to delete biometric data collected prior to the law's enactment.

Operation of Lockport's Face Recognition System

Lockport's counsel confirmed to NYSED that "following the District's receipt of [NYSED's] letter dated November 27, 2019, the District commenced full operation of the [face recognition system] beginning January 2, 2020 …" (Coyle Ex 19). In this letter, Lockport also

[2] The bill was amended as A954 and passed and signed with amendments in January 2021. 2021 NY AB 954 (Coyle Ex 44).

reiterated its and NYSED's foundational conclusion that "Education Law §2-d is not implicated by the District's use of the […] System [and] the status of the regulations under that statute serve as no impediment to implementation" of the system (*Id.*). Lockport's system was operational from January 2, 2020 until December 22, 2020 (NYSED Br at 10; Lockport Br at 3-4).

ARGUMENT

I. THE PETITION IS NOT MOOT.

Respondents argue that the Petition is moot due to the enactment of Technology Law §106-b (NYSED Br at 11), but this argument is misplaced. The Petition is not moot for two reasons – (1) the enactment of the law has not resolved all of the Petitioners' requests for relief; and (2) the rights of the parties are affected by the determination and the Petitioners continue to suffer harm.

a. Technology Law §106-b Has Not Resolved All Of The Precise Relief Requested.

The entirety of the relief requested by Petitioners was not and cannot be granted by Technology Law §106-b. An issue is not moot if a changed circumstance does not resolve the precise relief requested (*Matter of Herald Co v Weisenberg*, 59 NY2d 378 [1983] [finding that even though the hearing at issue had already occurred, the petition was not moot because a separate ground of relief sought, the provision of a transcript, had not yet occurred]; *see also Czajka v Dellehunt*, 125 AD3d 1177 [3d Dep't 2015]). Here, Technology Law §106-b does not address Petitioners' request to annul, vacate, and set aside NYSED's Determination that no student data, as that term is defined in Education Law §2-d and its implementing regulations, 8 N.Y.C.R.R. Part 121, is implicated by Lockport's utilization of a face recognition technology system or otherwise revoke NYSED's November 27, 2019 letter granting Lockport permission to activate its face recognition system (AP ¶26).

NYSED acknowledges that only part of the relief requested by Petitioners, the request that Lockport cease use of its face recognition system, is impacted by the enactment of §106-b (NYSED

Br at 13).[3] It is quite clear that §106-b has an effect on only one of the Petitioners' requests—that NYSED direct Lockport to de-activate its face recognition system. The other types of relief requested, namely that NYSED annul its flawed interpretation of §2-d and revoke its November 27, 2019 Determination, have not been satisfied. In fact, §106-b does not mention the Determination at all, thus leaving it in effect.

This Court has determined that in cases where only *some* of the relief has already been granted, the entire case is not moot (*Lederman v King*, 47 NYS3d 838 [Sup Ct, Albany County 2016]). In *Lederman v. King*, a teacher brought an Article 78 action against the NYSED Commissioner demanding two forms of relief: 1) that her growth score and "ineffective" teacher rating be set aside as arbitrary and capricious, and 2) that NYSED's growth measures system be permanently enjoined unless modified to "rationally evaluate teacher performance" (*Id.* at 839). NYSED then amended its metrics for measuring teacher performance, altering the "Growth Model" that Lederman challenged (*Id.* at 841). This Court held that Lederman's challenge to NYSED's growth measures system as a whole was rendered moot by the new regulations, but that her challenge to her personal rating was not moot because the specific relief she sought—that her own rating be set aside—had not been granted. Here, Petitioners' requests for NYSED's interpretation to be annulled and the Determination letter to be revoked have not been addressed and therefore the case is not moot.[4]

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[3] NYSED's case citations are inapposite as, unlike here, the legislation passed in those cases resolved all of the relief sought, not just part of it (NYSED Br at 12-14). Lockport asserts, but fails to develop, a mootness argument, which does not warrant discussion (Lockport Br at 3-4). Lockport also has asserted, but not moved, on 15 "Defenses" which Petitioners reject. Lockport's answer is directed to the original, not the Amended, Verified Petition.

[4] Respondents' citation to *Saratoga Cty Chamber of Commerce, Inc v Pataki*, 100 NY2d 801 [2003], is also misplaced. There, plaintiffs' challenges to an amendment became moot after the amendment expired. *Saratoga* demonstrates exactly why this suit is not moot—the Determination letter remains published, neither expired nor rescinded.

b. Petitioners' Rights Will Be Directly Affected By A Judgment In This Case.

An action "presents a live controversy where the rights of the parties will be directly affected by the determination and where the judgment has 'immediate consequence' for them" (*Johnson v Pataki*, 91 NY2d 214, 222 [1997][citing *Matter of Hearst Corp v Clyne*, 50 NY2d 707, 714 [1980]]; *see also Lederman*, 47 NYS3d at 841 [finding that an action is moot if it has "no practical, binding effect on the parties…"]). Petitioners' rights to the protections afforded them by Education Law §2-d are at stake in this action and NYSED's refusal to classify the data from Lockport's system as "student data" causes ongoing and immediate harm to Petitioners.

Lockport's system was activated on January 2, 2020 and continuously scanned student faces until December 22, 2020, when Technology Law §106-b came into effect (Coyle Ex 17, Lockport Br at 4).[5] As Lockport admits, its face recognition system "takes biometric measurements of all faces that are within the frame of the District's security cameras, including students, staff, visitors, vendors, and parents" (Lockport Ans ¶¶34-35). Section 106-b does not direct schools to delete the immense amount of sensitive student biometric data collected from each of the children of the Petitioners during the time period Lockport's system was active.

If NYSED's erroneous determination that data produced from Lockport's system is not "student data" under Education Law §2-d is allowed to stand, this sensitive student biometric data will be left unprotected (AP ¶¶34, 37, 40-44) and the Petitioners will have no recourse in the event of a breach. Importantly, the privacy, data security, transparency, and accountability measures of Education Law §2-d do not apply (AP ¶¶107-121). The student biometric records collected by the system can be shared with anyone or sold or used for commercial purposes (AP ¶¶107, 109-10), the biometric data can be redisclosed by third-parties (AP ¶107), and alarmingly, Petitioners will not be notified of any breaches of the system and any potential compromise of the data (AP ¶¶113-

[5] Lockport implemented in-person, hybrid, and remote instructional models in 2020 (*see* https://www.lockportschools.org/reopening).

15, 116). Petitioners are also denied the right to file complaints about breaches or unauthorized releases of information from the system (AP ¶113), none of the third-party contractors working with Lockport is obligated to submit a data security and privacy plan (AP ¶111), and Lockport does not have to publish supplemental information about each third-party contract to ensure that student data will not be shared (AP ¶117).

This significant harm to Petitioners and their children continues to accrue, even now that the system is turned off, as the data previously collected remains unclassified as "student data" and not subject to any of §2-d's protections. Petitioners' rights are clearly impacted by NYSED's erroneous Determination and it will continue to have a deleterious effect unless and until it is annulled.

Respondents' rights are also directly implicated by a judgment in this matter, showing that it is not moot. A finding regarding NYSED's Determination will have a practical, binding effect on NYSED in this matter and others in which the definition of "student data" is at issue. Any New York school district that obtains any type of biometric identifying technology in the future will be bound by the Determination and would be able to activate its system by simply claiming that the system does not "create or maintain student data." NYSED's erroneous interpretation will also surely be carried over into the study mandated by Technology Law §106-b, which will determine whether facial recognition technology can ever be used in schools in New York. *Matter of Charles A Field Delivery Serv, Inc*, 66 NY2d 516, 520 [1985][explaining agency obligations to avoid inconsistencies with prior policy]. Likewise, if NYSED's Determination is annulled in this matter, then Lockport must immediately comply with all of the provisions of Education Law §2-d. Lockport may need to restructure its contracts with its third-party vendors, implement data protection controls to protect the student biometric data it has already collected, and inquire into and notify parents of data breaches that have already taken place.

It is clear that there is a live controversy, that the rights of Petitioners and Respondents will be directly affected by a judgment in this matter, and that any determination will have a practical, binding effect on the parties. Therefore, this matter is not moot.

c. Even If This Court Finds The Proceeding Moot, The Exception To The Mootness Doctrine Applies.

Even if this Court determines that the proceeding is moot, which it should not, the exception to the mootness doctrine applies. Courts must review issues that have become moot if there is: "(1) a likelihood the issue will repeat, either between the same parties or among other members of the public, (2) an issue or phenomenon typically evading appellate review, and (3) a showing of significant or important questions not previously passed upon" (*Matter of Hearst Corp*, 50 NY2d at 714; *City of New York v Maul*, 14 NY3d 499 [2010] [mootness exception applied to claims that services provided by agencies to persons in foster care were inadequate]).

Here, Petitioners' claims meet all three tests. First, the issue is likely to repeat because Lockport is expected to resume use of its system if given permission by NYSED after the requirements of Technology Law §106-b are met.[6] If the District reactivates its system, families will continue to be directly impacted by the collection of student biometric data that, under NYSED's faulty interpretation, lacks Education Law §2-d protections.

Even if Lockport does not reactivate its system, it is likely that another school district in New York will attempt to utilize a similar system and will rely on NYSED's Determination. NYSED's own analysis found that 28 other school districts have already utilized public funding to purchase systems with biometric identifying capabilities, *i.e.,* facial recognition or systems with

[6] Mark Scheer, *UPDATE: Lockport school district will follow new law barring facial recognition tech*, Lockport Union Sun & Journal, Dec. 22, 2020, https://www.lockportjournal.com/news/update-lockport-school-district-will-follow-new-law-barring-facial-recognition-tech/article_c152461e-4497-11eb-b0a4-dfd6492570f2.html (Coyle Ex 43).

self-learning analytics.[7] NYSED's misinterpretation of "student data" will recur in perpetuity with respect to Lockport and all other districts that have already obtained any sort of biometric surveillance or plan to in the future.

Second, the issue will evade review. Here, the Petitioner's children and all current and future Lockport students could graduate or age out of school and leave the District before their claims are adjudicated, leaving troves of their biometric data behind without the protections of Education Law §2-d. Courts have recognized that the "aging out of potential plaintiffs" supports the criteria of evading review (*City of New York v Maul*, 14 NY3d at 507).

Third, this is clearly a significant, important, and novel question which necessitates adjudication. NYSED's interpretation of Education Law §2-d in the context of a face surveillance system is an issue of first impression and is a critical question impacting student data privacy and the use of developing technological systems. No court in New York has ever opined on this issue and the spread of these systems and resulting accumulation of data require adjudication (*Baumann & Sons Buses, Inc v Bd of Ed, Northport-E Northport Union Free Sch Dist,* 46 NY2d 1061, 1063 [1979] [finding that an issue was not moot because it was "one of first instance and public importance affect[ing] boards of education and trustees of school districts generally and thus likely to recur."]).

For all the foregoing reasons, the Petition is not moot and even if it were, the exception to mootness applies.

II. PETITIONERS ASSERT THAT NYSED'S DETERMINATION HAS DENIED LOCKPORT'S STUDENTS AND THEIR FAMILIES THE PROTECTIONS OF EDUCATION LAW §2-D, NOT THAT IT HAS BEEN VIOLATED.

Petitioners agree with Respondents' contention (Lockport Br at 14) that Education Law §2-d does not confer a private right of action on Lockport's students and their families and

[7] Coyle Ex 42.

Petitioners do not, in fact, claim violations of Education Law §2-d. Instead, Petitioners argue that NYSED's arbitrary, capricious, and irrational Determination that Lockport's face recognition system does not involve the creation or maintenance of student data has stripped them of the protections afforded by Education Law §2-d.[8] That is, Petitioners challenge the Determination that §2-d does not apply to the data, not any violation of §2-d itself. Respondents' entire argument, therefore, is irrelevant and should be disregarded.[9]

NYSED also incorrectly suggests that Petitioners' sole "remedy lies through an administrative complaint" as established by Education Law §2-d and its regulatory scheme.[10] But this argument defies logic because this statutory and regulatory scheme applies only to "student data" under the law and NYSED has made a final determination that the Lockport face recognition system does not implicate the creation or maintenance of "student data" (AP ¶¶ 86, 87). Even if they wanted to, Petitioners could not bring an administrative action challenging violations of Education Law §2-d because NYSED has interpreted that §2-d does not apply to the data from Lockport's system.

Petitioners have stated a valid claim against NYSED's Determination and therefore the Petition should be granted.

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[8] Those rights are fully summarized at AP ¶¶ 103-121.

[9] Both Respondents' memoranda of law rehearse a number of cases for the basic proposition that courts dismiss Article 78 proceedings which are deemed an end-run around statutes that do not create a private right of action. *See* NYSED Br at 15-16; Lockport Br at 1-2.

NYSED suggests that *Magnoni v. Plainedge Union Free School District*, 2018 U.S. Dist. LEXIS 142897 [SDNY Aug. 22, 2018] is somehow dispositive of their motion. There, defendants conceded that they had violated IDEA, FERPA, and Education Law §2-d by disclosing protected student data; plaintiffs sought monetary redress for the harms they claimed accrued to their disabled child. Petitioners here do not advance any claim that their students' information has been disclosed in violation of Education Law §2-d and certainly do not seek monetary redress.

[10] Lockport has long agreed with NYSED's conclusion that neither Education Law §2-d, nor the regulatory scheme established in Part 121, afford Petitioners any administrative recourse (Coyle Ex 19).

III. NYSED'S NOVEMBER 27, 2019 DETERMINATION IS A FINAL AGENCY DETERMINATION SUBJECT TO REVIEW UNDER ARTICLE 78.

Respondents belatedly argue that NYSED's November 27, 2019 Determination was merely an "interim and advisory opinion" (NYSED Br at 19), but neither the facts nor NYSED's public communications support this claim.

It is well settled that "[a] determination becomes final and binding when it has an impact upon a [party] or when it becomes clear that a [party] has been aggrieved" (*Matter of Halpin v Perales*, 203 AD2d 675, 677 [3d Dep't 1994]; *see also New York State Assn of Counties v Axelrod*, 78 NY2d 158 [1991]). NYSED's Determination represents a "definitive position on the issue that inflicts an actual, concrete injury" on Petitioners (*Stop-The-Barge v Cahill*, 1 NY3d 218, 223 [2003][*quoting Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]]).[11] Petitioners suffered an injury when, pursuant to the Determination, Lockport activated its system in January 2020. At that point, the system began scanning and analyzing student faces and storing data related to their facial signatures. AP ¶¶41-44. And, because NYSED has determined, and Lockport has concurred, that "no administrative action or steps [are] available" to Petitioners under Education Law §2-d and its regulations, there are no administrative proceedings available to redress the injury imposed by the Determination (*Matter of Patel v Bd Of Trs Of Inc Vil Of Muttontown*, 115 AD 3d 862 [2d Dep't 2014]).

NYSED's argument that a "determination from the Chief Privacy Officer regarding student privacy was not required for Lockport's implementation of the facial recognition technology at issue," and that it was, therefore, merely "an interim and advisory opinion," NYSED Br at 19, is belied by the facts. NYSED's own documents and its public pronouncements demonstrate

[11] A similar principle holds in assessing when the limitations period begins to run on a petitioner's claims; the period begins when an agency determination is final and binding on a complainant—the point when the action has "impact on plaintiffs, or when it [is] clear that they were aggrieved" (*See Matter of Cabrini Med Center v Axelrod*, 107 AD2d 965 [3d Dep't 1985], *citing Matter of Filut v New York State Educ Dept,* 91 AD2d 722, 723 [3d Dep't 1982], *mot for lv to app den* 58 NY2d 609 [1983]).

conclusively that NYSED specifically withheld authorization of the implementation of Lockport face recognition system until it issued the November 27, 2019 Determination.[12] NYSED's communications further demonstrate that Lockport accepted NYSED's directive "to cease the testing and utilization of facial recognition technology" until NYSED indicated it was "satisfied that proper protocols and protections are in place"[13]—as NYSED indicated it was with the Determination.

NYSED consistently and repeatedly prohibited Lockport from utilizing its face surveillance system, and Lockport complied, as set forth in the following examples:

- By email dated May 30, 2019, NYSED Chief Privacy Officer Akinyemi advised Superintendent Bradley that "[t]o avoid any confusion, I want to be clear that the Department has not approved this initial implementation and you should not commence until we receive information that reassures us that student information will be properly protected and the Department confirms in writing that we are reassured."[14]

- By email dated June 27, 2019, O'Hare advised reporters that "t[o] be clear, the Department has directed the Lockport School District to cease the testing and utilization of facial recognition technology until further notice. Department staff has consistently communicated to the District that they should refrain from the use of the facial recognition technology until the Department is satisfied that proper protocols and protections are in place and has not deviated from that position. Any testing or implementation that may be occurring is being done contrary to clear direction from the Department."[15]

- By email dated June 27, 2019, Akinyemi advised Jeffrey Swiatek, counsel for Lockport, that "comments attributed to the district that say that the Department has given them permission to go ahead with the testing" were "incorrect. This was certainly not what we communicated during our visit or at any time. I clearly communicated that Commissioner asked that all use of the system cease until further notice."[16]

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[12] Coyle Ex 41, in which NYSED's Acting Commissioner Shannon Tahoe advised Regent Cottrell that NYSED's "concerns under Education Law section 2-d have been resolved" because no "student data" will be "used in the technology."
[13] Coyle Ex 37.
[14] Coyle Ex 32; s*ee also* Coyle Ex. 33 (same communication to media).
[15] Coyle Ex 34.
[16] Coyle Ex 35. CPO Akinyemi highlighted a portion of the article in which Robert LiPuma, Lockport's director of technology, said representatives from NYSED told Lockport the decision whether to use the facial recognition technology ultimately rests with the District and the school board. "They're not the decision-makers in the end. I think we're still operating from we have an approved plan," LiPuma said. "We can move ahead and they told us it's up to us. It's a local decision by our board and we've made those decisions." CPO Akinyemi rejected the District's statements.

- By email dated June 27, 2019, Akinyemi advised Bradley "During my visit to the Lockport School District on June 6th, I communicated to all in attendance the message from the Commissioner of the NYS Education Department that the District immediately cease the use of facial recognition technology until the Department was satisfied that proper protocols and protections were in place to protect the students and student personally identifiable information. I communicated this message in clear and unambiguous terms … To be clear, I want to re-iterate that the **Commissioner has directed Lockport to cease the testing and utilization of facial recognition technology in every form until further notice.** Please let me know if you have any questions." [emphasis supplied].[17]

- By email dated September 6, 2019, Akinyemi advised Bradley and Dr. Craig Godshall that "Pursuant to the [Education Law §2-d], the Department has consistently communicated to the District that it should cease the testing and utilization of facial recognition technology. The Department's position continues to be that this technology must not be tested or used on students or utilize student data until further notice. Commissioner Elia reiterated this position with Lockport representatives in the meeting of August 8th held in Albany."[18]

NYSED's Determination does not set forth "conclusions …based upon hypothetical prospective transactions," as the Court found the state agency advisory opinion at issue in *Queensview Hous Enters, Inc v Grayson*, 179 AD 2d 434, 435 [1st Dept. 1992] to be. NYSED instead determined that Education Law §2-d did not apply to the biometric data generated by the Lockport face recognition system and authorized Lockport to activate it as soon as Lockport finalized its privacy policy—which Lockport confirmed to NYSED it had done (*See* Coyle Ex. 19).

The documentary record and NYSED's public pronouncements relating to its November 27, 2019 Determination demonstrate that NYSED took a "definitive position on the issue that [has] inflict[ed] an actual, concrete injury" on Petitioners (*Stop-the-Barge*, 1 NY3d at 223; *Matter of Essex City,* 91 NY2d at 453-54).

[17] Coyle Ex 36; *See also* Coyle Exs 37, 38, 39 (same responses provided to media outlets).
[18] Coyle Ex 40.

CONCLUSION

For the reasons stated above, the Court should deny Respondents' motions to dismiss and grant the Petition.

Respectfully Submitted,

Dated: March 25, 2021
New York, New York

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CERTIFICATE OF COMPLIANCE
WITH 22 NYCRR §202.8-b

I hereby certify that:

1. This brief complies with the word count limitation of 22 NYCRR §202.8-b because the total word count, according to the word count function of Microsoft Word the word processing program used to prepare this document, of all printed text in the body of the brief, exclusive of the caption, table of contents, table of authorities and signature block is 4184.

/s/ Beth Haroules

Beth Haroules
Attorney for Petitioners

Dated: March 25, 2021